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No. 14-844

IN THE
Supreme Court of the United States

ANTOINE BRUCE,

Petitioner,

v.

CHARLES E. SAMUELS, JR., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

This case allows the Court to resolve a deep circuit split over the correct interpretation of 28 U.S.C. § 1915(b)(2), which governs the manner in which indigent prisoner litigants make 20%-of-monthly-income installment payments toward filing fees they owe to federal courts. The courts of appeals have identified two possible approaches. First, the per-prisoner (or sequential) approach requires prisoners to pay off multiple filing fees (and costs) sequentially, beginning the 20% monthly payments on a second, for instance, only after full satisfaction of the first. Second, the per-case (or simultaneous) approach requires prisoners to pay off multiple fees (and costs) concurrently, such that a prisoner with five outstanding filing fees (or costs) would have 100% (*i.e.*, 5 x 20%) of his income garnished each month. Making an already complicated case more complicated, Respondents in their brief even identify a sub-variant of the per-case approach (*see infra* p. 12). In the end, as shown in our opening brief and reinforced below, the text, the statutory structure, context, and purposes, the canon of constitutional avoidance, and administrative feasibility considerations all compel the per-prisoner approach.

I. THE PLRA'S TEXT REQUIRES THE PER-PRISONER APPROACH

A. The Combination of the Singular "Clerk of the Court" and the Plural "Filing Fees" Shows Congress Adopted the Per-Prisoner Approach in Subsection (b)(2)

Whether the PLRA's text adopts a per-prisoner or per-case approach turns on the interpretation of the

plural "filing fees" in subsection (b)(2), as accompanied by the singular "clerk of the court" in that same subsection: "The agency having custody of the prisoner shall forward payments from the prisoner's account to *the clerk of the court* each time the amount in the account exceeds $10 until the *filing fees* are paid." 28 U.S.C. § 1915(b)(2) (emphasis added).

Petitioner Antoine Bruce views the quoted sentence in (b)(2) as addressing the common situation in which a prisoner has filed more than one civil action or appeal and thus owes multiple "filing fees" (plural) – rather than a single filing fee – and as requiring that one 20% payment be made to a single court in that situation (because only one "clerk of the court," singular, is being paid at a time). Pet. Br. 17-19. In contrast, Respondents interpret (b)(2) as addressing the payment of multiple fees associated with a single civil action or appeal. *See, e.g.*, Resp. Br. 22 ("the reference to 'fees' in subsection (b)(2) refers to the multiple fees due in a single case").

Respondents' argument that (b)(2)'s "filing fees" refers to the "multiple fees [that] can be assessed in a single case" is belied by the facts. Resp. Br. 21. With respect to district court proceedings, Respondents identify only a $50 administrative fee, in addition to the $350 statutory filing fee. *Id.* But a party proceeding *in forma pauperis* under § 1915 is not subject to the $50 administrative fee. *See* 28 U.S.C. § 1914; D. Ct. Misc. Fee Schedule ¶ 14, http://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule (Aug. 20, 2014). As a result, contrary to Respondents' assertion that there are "multiple fees" in a single case (Resp. Br. 22), there is a

single filing fee for civil actions initiated by *in forma pauperis* litigants.

With respect to appeals, Respondents identify a $5.00 "statutory fee" that the appellant must pay to the district court under 28 U.S.C. § 1917 in addition to the $500 "docketing fee" that the district court collects on behalf of the court of appeals under 28 U.S.C. § 1914. Resp. Br. 21-22. However, these court fees are components of a single $505 filing fee, not two separate filing fees. When the Administrative Office of the U.S. Courts' Miscellaneous Fee Schedule was amended in 2014, the Administrative Office of U.S. Courts issued a notice stating that "a statutory fee of $5 will be charged in addition to a $500 docketing fee, *for a total filing fee of $505*." *See* http://www.uscourts.gov/news/2014/11/19/new-court-fees-take-effect-dec-1 (emphasis added). The courts of appeals therefore direct appellants to pay a single $505 filing fee to the district court when they docket the notice of appeal.[1] This approach of combining all start-up fees into a single "filing fee" is consistent with the PLRA's terms, as Congress collectively, and definitionally, referred to "the amount of

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[1] *E.g.*, Fee Schedule for 2d Cir. (Dec. 1, 2013), http://www.ca2.uscourts.gov/clerk/case_filing/fee_schedule.html (listing $505 fee for "Notice of Appeal"); 4th Cir. Appellate Procedure Guide at 1 (Dec. 1, 2014), http://www.ca4.uscourts.gov/AppellateProcedureGuide/Initial_Require-ments/APG-appealfeesandindigentstatus.html (listing a "$505 fee" for an appeal); *see also Lee v. Superintendent Houtzdale SCI*, 798 F.3d 159, 163 (3d Cir. 2015) ("$505 filing fee" for filing notice of appeal); *United States v. Chisholm*, No. 15-4051, 2015 U.S. App. LEXIS 13278, at *5 (10th Cir. July 30, 2015) (directing the appellant "to immediately pay the entire $505 appellate filing fee").

fees permitted by statute" for a single civil action or appeal as the "filing fee." *See* 28 U.S.C. § 1915(b)(3).

In addition, Bruce's interpretation of "filing fees" in § 1915(b)(2) as referring to multiple actions is consistent with the surrounding statutory text, which makes clear that Congress understood there is a single "filing fee" for each civil action or appeal. Section 1915(b)(1) states: "if a prisoner brings a civil action or files an appeal *in forma pauperis*, the prisoner shall be required to pay the full amount of a *filing fee*." 28 U.S.C. § 1915(b)(1)(emphasis added). And § 1915(b)(3), in full, states: "In no event shall the *filing fee* collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment." *Id.* § 1915(b)(3) (emphasis added). Consequently, the two provisions that immediately surround § 1915(b)(2) confirm that Congress understood there to be a single filing fee for each civil action or appeal for a prisoner proceeding *in forma pauperis*. Because "filing fees," then, must refer to more than one civil action or appeal, (b)(2)'s directive that "[t]he agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court . . . until the filing fees are paid" must contemplate a per-prisoner approach, wherein each filing fee owed to each clerk of the court is paid off one at a time. *Id.* § 1915(b)(2).

Because the contrast between the use of "filing fee" in (b)(3) (in referring a single action or appeal) and the use of plural "filing fees" in (b)(2) undermines a per-case approach, Respondents adopt the farfetched notion that "filing fee" in (b)(3) must refer to the "initial

partial filing fee." Resp. Br. 23. That position does not hold up because elsewhere in the statute, Congress consistently refers to the "initial partial filing fee" in those very terms and uses "filing fee" to describe the total amounts owed at the initiation of a civil action or appeal. There is no reason that Congress, having referred to the "initial partial filing fee" as just that in (b)(1), (b)(2), and (b)(4), would suddenly refer to it as the "filing fee" in (b)(3), especially when elsewhere in the statute – specifically (b)(1) – Congress used "filing fee" to mean something else.

Likewise, § 1915 includes a parallel provision on costs awards that cannot possibly be interpreted as Respondents read subsection (b)(3), even though the two sections are worded almost identically. Section 1915(f)(2)(C) provides: "In no event shall the costs collected exceed the amount of the costs ordered by the court." By Respondents' logic, this prohibition would refer to an initial partial costs award, which does not exist in the statute. The obvious purpose of subsection (f)(2)(C) is to ensure that a court does not add a premium – by, for example, charging interest – onto the prisoner's delayed payment of all costs awarded in the case. In the same vein (and contrary to Respondents' creative purpose for (b)(3), *see* Resp. Br. 23), subsection (b)(3) ensures that a court will not add a premium onto the delayed payment of "the filing fee," referring to the full filing fee required for initiation of an action or appeal. *See Hagan v. Rogers*, 570 F.3d 146, 155 (3d Cir. 2009) ("common sense indicates that § 1915(b)(3) . ensures that an IFP prisoner's fees, *when paid by installment*, will not exceed the standard individual filing fee paid in full") (emphasis added).

In sum, under Bruce's straightforward textual interpretation, "filing fee" is the amount charged for the initiation of a civil action or appeal, and "filing fees" are due when a prisoner has initiated more than one civil action or appeal. Under Respondents' interpretation, the meaning of "filing fee" is ever-changing. The Court should adopt Bruce's simple, textual approach, over Respondents' strained presentation.

B. Respondents' Rigid Tying of Subsection (b)(2) to Subsection (b)(1) Cannot Sustain the Per-Case Approach

In addition to contesting Bruce's textual argument, Respondents posit their own textual argument: that subsection (b)(2) is "linked" to (b)(1) in the text and therefore should be treated on the per-case basis on which all agree (b)(1) applies. Resp. Br. 16. Respondents' coupling of the two subsections for interpretive purposes is not persuasive, at a minimum because, as we noted in our opening brief, subsection (b)(2) uses entirely different nomenclature and structures: "clerk of the court" instead of "court"; a different financial measuring point (monthly income vs. account balance); (b)(2) alone establishes a $10 minimum threshold; and, most importantly, (b)(2) uses "filing fees" (plural) and (b)(1) uses only "filing fee." *See* Pet. Br. 31-32. Respondents note that there are specific reasons for these differences (*see* Resp. Br. 19-20), but that is exactly the point. Congress was viewing matters from the perspective of the task at hand in each provision, not simply adding more sentences to (b)(1) by creating (b)(2).

Further, Respondents' assertion that Congress viewed subsections (b)(1) and (b)(2) as inextricably tied

is disproven by the costs provisions. There, Congress said that costs should be collected "in the same manner" as filing fees under (b)(2). 28 U.S.C. § 1915(f)(2)(B). As there is no initial partial payment corollary to (b)(1) in the costs provision, (b)(2) demonstrably can – indeed, must – be read in isolation from (b)(1). Otherwise, (b)(1) would come along with (b)(2) to the costs provisions, thereby prompting initial partial costs payments.

Respondents assert that Bruce's reading of the statute requires a shift "in the middle of the [first] sentence" of (b)(2) from a single-case perspective to a multiple-filing viewpoint. Resp. Br. 18. Not true. Bruce reads the first sentence just as it is written: "After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20% of the preceding month's income credited to the prisoner's account." That is, monthly payments kick in after payment of the initial partial filing fee, but the question remains whether it is concurrent with any other filing fee or costs award, or sequential. In either instance, monthly payments and an initial partial filing fee are to be paid. The battle is over the meaning of the second sentence, where Congress switched to referencing "filing fees" (plural).

II. THE STATUTORY STRUCTURE AND CONTEXT CONFIRM THAT CONGRESS INTENDED THE PER-PRISONER APPROACH

A. In a "context" argument they make, Respondents devote a considerable portion of their brief to highlighting every word of the statute that refers to a single civil action or appeal, including references to "a" and "the." Resp. Br. 24-27. But that lengthy exercise

begs the question of how multiple filing fees are to be paid. Bruce does not contest that the filing of a single case or a single appeal triggers the obligation to make monthly installment payments. The issue is *when* such payments are to be made if the prisoner owes filing fees for more than one civil action or appeal.

In any event, Respondents are incorrect that the statute speaks solely from "the perspective of a single action or appeal, not from the perspective of multiple actions or appeals." Resp. Br. 24. On this front, there is the three-strikes rule in § 1915(g) – a lynchpin of the statute. Indisputably, one of the central purposes of the statute, reflected certainly in the three-strikes provision, was to address the practice of prisoners engaging in the filing of multiple civil actions and appeals. Consistent with the statute's focus on the problem of multiple filings – including the three-strikes provision – (b)(2)'s reference to "filing fees" should be seen as referring to more than one case.

Contrary to Respondents' contention, the Court's decision in *Coleman v. Tollefson*, 135 S. Ct. 1759 (2015), does not decree that the entirety of § 1915 "is written from the perspective of a single action or appeal." Resp. Br. 28. What *Coleman* indicates is that § 1915 should be read commensurate with "what the statute *literally* says" (*Coleman*, 135 S. Ct. at 1763 (emphasis added)), and the Court then focused on the singular usage of the terms "an action or appeal" and "was dismissed" in the three-strikes provision when determining whether each district court dismissal (even if still on appeal) counts as a strike. Applying *Coleman*'s teaching, the statute *literally* uses the plural "filing fees" and the singular "clerk of the court"

when announcing the procedures for installment payments in the second sentence in subsection (b)(2). The literal interpretation of those terms is that a single court gets an installment payment when more than one filing fee is owed.

B. Respondents also contest Bruce's arguments that the statutory context supports a per-prisoner approach. None of their responses has merit.

1. Respondents have no real response to Bruce's showing that the supposed deterrence objective associated with the per-case approach would have caused Congress to state explicitly the adoption of the per-case approach on the face of the statute. It is no answer to say that this Court regularly is called on to resolve "ambiguity" in statutes, even those that might have a deterrence purpose. Resp. Br. 36 n.10. In this instance, Respondents take the position that the per-case approach is necessary, because Congress sought – without any qualification anywhere in the PLRA – to deter frivolous lawsuits. If so, Congress would have put in the strongest terms a warning to prisoners that they will lose all of their income if they repeatedly file dismissable lawsuits. Plainly, subsection (b)(2) contains no overt warning of the per-case approach.

2. Respondents likewise have no solid answer for Bruce's contention that the per-case approach suffers from Congress having failed to address what to do with respect to the sixth encumbrance (*i.e.*, filing fee or costs award) and up, when 100% of monthly income is by then gone. Cynically, they say that prisoners likely would have three strikes by the time the prisoners would otherwise have incurred five encumbrances. *See* Resp. Br. 29.

But it is no anomaly that a prisoner would accrue five or more encumbrances. A single case, as the Second Circuit has recognized, can produce numerous filing fees and costs awards. *See Whitfield v. Scully*, 241 F.3d 264, 276 (2d Cir. 2001). For instance, the case leading to this petition is subject potentially to seven encumbrances. The litigation was brought in the D.C. district court (where one filing fee accrued and a costs award was possible); that led to the mandamus petition in the D.C. Circuit (where another filing fee accrued and another costs award could have come); now the case has been transferred to Alabama federal court (no new filing fee for a transfer, but potentially a costs award at the end of the case); and there could be an appeal to the Eleventh Circuit at the end (another filing fee, and potentially another costs award). That would make for seven total filing fees and costs; moreover, several more could have accrued if, on mandamus, the D.C. Circuit had decided to venue some claims in D.C. and some in Alabama (leading to a dizzying number of additional potential filing fees and costs for tandem cases).

3. Respondents reply "never mind" to Bruce's contextual argument that Congress's provision for costs awards in monthly installments – and the complications it causes (*see* Pet. Br. 25-26) – undermine the per-case approach. They say "never mind" because the federal government in practice rarely seeks costs against prisoners (though they admit states do, *see* Resp. Br. 31 n.8), and costs awards supposedly are small. Irrespective of the federal government's practice, nothing in § 1915(f) suggests Congress anticipated anything other than the regular awarding of costs, having made detailed provision for their collection. As

to Respondents' statement that costs awards, and particularly large ones, are "rare" (*id.* at 31), a survey of federal cases involving indigent prisoners reveals awards of $3,857.35,[2] $3,214.50,[3] $3,018.35,[4] $1,934.47,[5] $1,794.25,[6] and $1,637.76.[7]

4. In response to Bruce's argument that the per-case approach would undermine the purpose of the $10-rule, *see* Pet. Br. 27-31, Respondents offer several counterarguments, none of which is compelling. Respondents initially misconstrue Bruce's argument as claiming that under the per-prisoner approach, prisoners will always, under all circumstances, be left with at least $6 in their accounts. Resp. Br. 33. Of course, as Respondents remind us, prisoners may have other payment obligations beyond the installment payments mandated by § 1915(b)(2). But that is beside the point. Bruce's argument was that the $10-rule was meant to ensure that the monthly installment payments *by themselves* would not drain prisoners' accounts and leave them with no money for discretionary spending. The $10-rule is coupled with the 20%-installment-payment provision for a reason. Together, those provisions require prisons to wait until a prisoner's account grows beyond $10, and only then deduct a portion of

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[2] *Singleton v. Smith*, 241 F.3d 534, 537, 544 (6th Cir. 2001).

[3] *McGill v. Faulkner*, 18 F.3d 456, 458 (7th Cir. 1994).

[4] *Draper v. Rosario*, No. 2:10-cv-0032, 2014 WL 3689718, at *3 (E.D. Cal. July 24, 2014).

[5] *Fernandez v. Cal. Dep't of Corr.*, No. 2:11-cv-1125, 2015 WL 1530499, at *3 (E.D. Cal. Apr. 2, 2015).

[6] *Adkins v. Wolever*, No. 1:03-CV-797, 2007 WL 1521194, at *2 (W.D. Mich. May 21, 2007).

[7] *Janoe v. Stone*, No. 06-CV-1511, 2012 WL 70424, at *1 (S.D. Cal. Jan. 9, 2012).

the preceding month's income (20% for a filing fee or 40% for both a filing fee and a costs award), such that, after the deduction, some non-trivial amount will always be left in the account. The per-case approach, by draining all or nearly all of some prisoners' accounts, would undercut the $10-rule's purpose.

Realizing this, Respondents offer a new spin on the per-case approach – a sort of "modified" per-case approach that they say the Bureau of Prisons ("BOP") applies. *See* Resp. Br. 32. Whereas under what might be called the "classic" per-case approach, prison officials take $100% of monthly income to satisfy five or more encumbrances whenever the balance in the account is more than $10, Respondents' modified per-case approach sometimes stops short of taking all of a prisoner's monthly income. Specifically, Respondents have posited a reading of the $10-rule whereby prison officials will stop simultaneous collection at the encumbrance just prior to the one that would lead the account to go below $10. To Respondents' credit, at least the modified per-case approach has the benefit of leaving $10 in the account and therefore being consistent with the notion that Congress, with the $10-rule, evinced the intent to leave prisoners always with some minimal amount after application of subsection (b)(2).

But the difficulties with the modified per-case approach are legion. The glaring problem is that the methodology has no support in the case law, as the courts of appeals have long been in agreement (thus, making it the "classic" per-case approach) that in any month a prisoner's account balance exceeds $10, up to 100% of the preceding month's income will be with-

drawn. *See Newlin v. Helman*, 123 F.3d 429, 436 (7th Cir. 1997) (adopting per-case approach and observing that "[f]ive suits or appeals mean that the prisoner's entire monthly income must be turned over to the court until the fees have been paid"); *Siluk v. Merwin*, 783 F.3d 421, 426 (3d Cir. 2015) (adopting per-prisoner approach and noting that, under the per-case approach, "unlike for the sequential rule, . . . if an inmate had $10 and owed money in five cases the clerk would deduct $2 for each case thus emptying the inmate's account"); *Torres v. O'Quinn*, 612 F.3d 237, 246 (4th Cir. 2010) (same); *see also* Pet. Br. 28 (collecting cases).[8]

Additionally, the modified per-case approach leads to results flatly contradicted by the statute, as when, for example, $11 is in the account, all from income earned the previous month; in that situation, no installment payments would occur, since even one 20% payment ($2.20) would send the balance under $10. Yet, § 1915(b)(2) states, unequivocally, that prison officials "shall forward payments each time the

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[8] To counter the armada of case law confirming Bruce's reading of the $10-rule, Respondents cite a lone decision that they say indicates "*[s]everal* courts of appeals have proceeded on [Respondents'] assumption." Resp. Br. 32 (citing *Skinner v. Govorchin*, 463 F.3d 518, 523-24 (6th Cir. 2006)) (emphasis added). *Skinner*, however, is one case (not several) and made only a passing comment that $10 should "remain[] in the account each month." *Skinner*, 463 F.3d at 524. In reality, the Sixth Circuit – consistent with the other circuits (and in a case Respondents even elsewhere cite, *see* Resp. Br. 38, 47) – adopts the view that "[n]o violation of the statute occurs if the application of the twenty-percent rule reduces the balance of the account below ten dollars." *McGore v. Wrigglesworth*, 114 F.3d 601, 607 (6th Cir. 1997).

amount in the account exceeds $10." And still another reason to reject Respondents' construction of the $10-rule is that state prison officials (and the vast majority of prisoners are in state prisons, not federal ones) appear not to follow it. *See Richmond v. Stigile*, 22 F. Supp. 2d 476, 477, 479 (D. Md. 1998); *Losee v. Maschner*, 113 F Supp. 2d 1343, 1345-47, 1355 (S.D. Iowa 1998).

Two wrongs don't make a right, and the Court should not adopt an ill-advised construction of the $10-rule in order to save the per-case approach from its inconsistency with Congress's intention that prisoners – even after application of subsection (b)(2) – retain a small measure of income. The Court should side with the per-prisoner approach, which unqualifiedly pays fidelity to the intent reflected in the $10-rule.

III. THE PER-PRISONER APPROACH BEST ACCOMPLISHES THE PLRA'S FULL OBJECTIVES

In showing that the per-prisoner approach best satisfies the PLRA's purposes, Bruce emphasized in his opening brief that Congress enacted the PLRA to effectuate two goals: to filter out "the bad claims" filed by prisoners *and* to "facilitate consideration of the good." *Jones v. Bock*, 549 U.S. 199, 204 (2007). Respondents never say how the per-case approach is compatible with ensuring prisoners continue to have motivation to file legitimate cases.

Instead, Respondents' focus is solely on deterrence, seeking first to show that adoption of the per-prisoner approach would result in a system too soft on prisoners. To this end, they insist that only the per-case approach requires a "financial commitment for each

action or appeal a prisoner files." Resp. Br. 33. Respondents are incorrect. Under the per-prisoner approach, there remain numerous financial disincentives to deter the filing of a frivolous lawsuit, including: (1) the initial partial filing fee, with no minimum threshold that a prisoner's account must surpass before this debt is collected[9]; (2) the 20% monthly installment for all outstanding filing fees, with ever-increasing months of installments each time a new lawsuit is filed; and (3) the 20% monthly installment payments for costs that might be awarded. Plus, these monetary disincentives are supplemented under the per-prisoner approach (as well as under the per-case approach) by non-financial checks that help thwart a frivolous filing. *See, e.g.*, 28 U.S.C. § 1915A (judicial screening for frivolousness); *id.* § 1915(g) (three-strikes rule); 42 U.S.C. § 1997e(a) (administrative exhaustion requirement).

Still focusing on deterrence, Respondents then contend that the PLRA is somehow in dire need of additional tools to accomplish its deterrence objective. To the contrary, the PLRA has been doing its job. Between 1995 and 2006, the rate of filings by "[p]rison and jail inmates" dropped by 60%, from "twenty-six federal cases per thousand inmates," to "less than eleven cases per thousand inmates." Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in Amer-*

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[9] While Respondents acknowledge that § 1915(b)(1)'s initial partial filing fee is, in fact, an economic disincentive, they brush it off as a "minimal" "one-time cost." Resp. Br. 37 n.11. Yet, Congress has recognized, in the *in forma pauperis* context particularly, that "the less a man has[,] the more important it is to him." H.R. Rep. No. 52-1079, at 2 (1892).

ica's Jails & Prisons: The Case for Amending the Prison Litigation Reform Act, 11 U. Pa. J. Const. L. 139, 141-42 (2008).

Respondents assert that "recent data" purportedly "confirms that frivolous prisoner lawsuits remain a serious problem," in that "[p]risoners have filed at least 25,000 civil rights and prison conditions lawsuits every year for the past five years." Resp. Br. 39 & n.13. However, Respondents fail to note that in relative terms the rate of filings has actually remained stable at a "per capita rate of approximately 10 lawsuits per 1,000 prisoners." Br. of *Amici Curiae* Thirty-Three Professors in Support of Petitioner in *Coleman v. Tollefson*, No. 13-1333, at 7 (Dec. 8, 2014); *see also id.* at 11-13. There are more prisoner cases now because there are more prisoners, not because the PLRA is failing sufficiently to deter individual prisoners from frivolous filings.

Finally, Respondents undermine their own deterrence cause, with their modified per-case approach. Again, under the modified per-case approach, prison officials do not collect an installment payment if it would result in less than $10 remaining in the prisoner's account after the deduction. Ironically, the per-prisoner approach actually provides a stronger deterrent in situations where a prisoner has slightly more than $10 in his account.[10] Take the example earlier

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[10] There may be plenty of such prisoners, given that some states pay working prisoners just pennies per hour, and some prisoners for whom jobs are unavailable receive "idle pay" that comes to about $10 per month. *See* Pet. Br. 37 n.9.

described, where a prisoner has $11 in his account, with that $11 all from income earned the prior month, and then assume five encumbrances (a mix of filing fees and costs). The result under the per-prisoner approach would be deductions of $4.40 (2 x $2.20, with one for the first filing fee and one for the first costs award), leaving $6.60 in the account. The modified per-case approach would take nothing because a deduction for just the first encumbrance would send the account below $10.

These vagaries illustrate further that the best course for satisfaction of the PLRA's twin objectives is for the Court to adopt the per-prisoner approach. It accomplishes – and reliably so – some deterrence among a slew of other mechanisms that deter, and it does not squelch commencement of the meritorious cases Congress wanted to ensure would still be brought.

IV. THE CONSTITUTIONAL-AVOIDANCE CANON SUPPORTS THE PER-PRISONER APPROACH

Despite Respondents' arguments to the contrary, the doctrine of constitutional avoidance provides an additional, compelling reason for this Court to adopt the per-prisoner approach.

Respondents begin by claiming that only in "rare cases" do prisoners present the sorts of fundamental-rights claims that would guarantee them a constitutional right of access to courts. Resp. Br. 46. This is demonstrably false. Each year, prisoners file thou-

sands of civil rights suits,[11] which by definition seek vindication of important constitutional rights. *See Bounds v. Smith*, 430 U.S. 817, 827 (1977) ("civil rights actions are of fundamental importance . in our constitutional scheme because they directly protect our most valued rights") (internal quotation marks and citation omitted). Such lawsuits include (like the litigation here) Eighth Amendment challenges to inhumane prison conditions.

Respondents emphasize that the collection of filing fees under the per-case approach will not completely block prisoners' access to courts. But as they later acknowledge (Resp. Br. 48), Bruce never said it would. Rather, he argued that the per-case approach will impermissibly chill indigent prisoners' constitutional right of court access by threatening them with the loss of up to 100% of their income as the price of litigating. Pet. Br. 45-46. Respondents needlessly work to distinguish *United v. Jackson*, 390 U.S. 570 (1968), a case Bruce cited only for its articulation of a basic principle of constitutional law that is relevant here and to which Respondents do not object. *Jackson* explains that if a statute imposes back-end costs on the exercise of a constitutional right which unnecessarily chill the exercise of that right, then the statute is unconstitutional. And this is so even if, as under the per-case approach, the statute does not outright bar the exercise of the right in question.

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[11] *See Table C-2A, U.S. District Courts—Civil Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 30, 2009 Through 2014*, at 3 (2014 Table C-2A), http://www.uscourts.gov/statistics/table/c-2a/judicial-business/2014/09/30.

For that same principle, Bruce also cited (and Respondents did not address) *Fuller v. Oregon*, 417 U.S. 40 (1974). *Fuller* involved a statute under which indigent defendants could be required to pay back the costs of state-appointed legal representation. *Id.* at 43. The Court found that the statute did not impermissibly chill the exercise of defendants' right to counsel because it was "carefully designed" to avoid imposing repayment obligations that would cause defendants significant hardship. *Id.* at 53. Lower courts have interpreted *Fuller* to mean that more onerous repayment obligations *do* chill the exercise of the right to counsel and are therefore unconstitutional.[12] Here, Congress "carefully designed" § 1915(b)(2) to ensure that prisons would take no more than 20% of prisoners' incomes each month, thereby imposing on prisoners a significant, but not overly harsh, repayment obligation.

In then addressing Bruce's "chill" argument, Respondents attack another strawman by noting that prisons are obligated to provide inmates with the basic necessities of life. Again, Bruce never argued that without any income, prisoners would be left to freeze in the winter or go without life-saving medical care. Instead, he explained that if prisoners are deprived of all their income, they could lose the ability to call or write to loved ones, buy reading materials, or acquire the few other simple amenities they are permitted in order to make prison life more bearable. Pet. Br. 47. The question here is not whether prisoners have a

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[12] *See Minn. v. Tennin*, 674 N.W.2d 403, 410 (Minn. 2004); *Hanson v. Passer*, 13 F.3d 275, 279 (8th Cir. 1994); *Alexander v. Johnson*, 742 F.2d 117, 123-24 (4th Cir. 1984); *United States v. Bracewell*, 569 F.2d 1194, 1199 (2d Cir. 1978).

right to those amenities, but whether the threat of having them taken away as the cost of exercising their right of court access would present constitutional concerns.

In order to lessen constitutional doubts about the per-case approach, Respondents again fall back on their modified per-prisoner approach, under which inmates will always be left with at least $10 in their accounts. Resp. Br. 49. While such an approach would leave prisoners with more money for simple amenities, Respondents' interpretation of the $10-rule is, as we have shown, illegitimate. *See supra* pp. 12-14.

Respondents' last ditch argument is that prisoners could simply seek relief through administrative proceedings or in state courts. Resp. Br. 49-50. The availability of administrative channels, without the potential for judicial review, does not answer concerns about the constitutional "right of access to *courts*." *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (emphasis added). And as for the availability of state courts, Bruce has made clear that many states have enacted statutes virtually identical to the federal PLRA, *see* Pet. Br. 52 n.16, and Respondents' only answer to this is that *some* states may not be as strict. Resp. Br. 50.

V. THE PER-PRISONER APPROACH IS ADMINISTRATIVELY MORE FEASIBLE

Respondents insist that the per-case approach is "straightforward" and that the per-prisoner approach "raises questions about how to sequence payments and which court orders should take priority." *Id.* at 42, 43. Neither claim is true. It is the per-prisoner approach that is straightforward, while the per-case approach is

unwieldy and therefore unlikely to have been the one Congress envisioned.

Respondents maintain that prison officials face the burden of "decid[ing] which [payment] orders to satisfy and in what order." *Id.* at 43. This argument manufactures confusion where there is none. The only logical way to sequence multiple payment obligations is chronologically. The first fee is paid off first, then the second, and so on. That is the approach taken by every court to have adopted the per-prisoner interpretation, and Respondents do not even suggest an alternative manner of sequencing, likely because no logical alternative exists, and because their own approach requires chronological sequencing as well (after the fifth encumbrance).

As Respondents admit, if a prisoner in a per-case regime is already subject to five encumbrances (and is therefore forfeiting 100% of his income, at least under the classic per-case approach), any additional payment obligations that he incurs will be "deferred," presumably until earlier-in-time obligations are satisfied. *Id.* at 30. Realizing this, Respondents argue that, although their approach also requires sequencing, it will occur less often, because only litigious prisoners will face more than five encumbrances. *Id.* at 44. We have, however, already shown that obtaining five encumbrances is hardly an oddity. *See supra* p. 10.

Under Respondents' novel approach to the $10-provision – *i.e.*, the modified per-case approach – prisons must engage in even more sequencing while facing other administrative hassles not presented by Bruce's approach. In addition to requiring prisons to forward up to five payments per month per prisoner, Respond-

ents' regime compels prisons to reevaluate each prisoner's account balance after each deduction, stopping deductions whenever the next withdrawal would bring the balance below $10. *See* Resp. Br. 32. When the prison officials must stop mid-process, where do they pick up the next month – with the first one that did not make the grade the prior month, or back with the first one in time (giving that encumbrance a payment two months in a row)?

Respondents scarcely address the point that the per-case approach, by sometimes taking all of prisoners' earnings, leaves the states unable to accomplish their own objectives through actual or threatened deductions from prisoners' wages. *See* Pet. Br. 51-53. State facilities cannot incentivize inmates to be prudent in seeking medical care by requiring co-pays, or incentivize good behavior through the threat of disciplinary fees, or even incentivize prison labor (which likely serves important rehabilitative goals) if many of their prisoners must forfeit all or nearly all of their earnings in order to satisfy federal PLRA obligations. To paraphrase the song, something from nothing leaves nothing, and that is the reality the states face under the per-case approach.

CONCLUSION

The decision of the D.C. Circuit refusing to stay collection of Bruce's portion of the filing fee owed for the mandamus petition should be reversed.

Respectfully submitted,

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